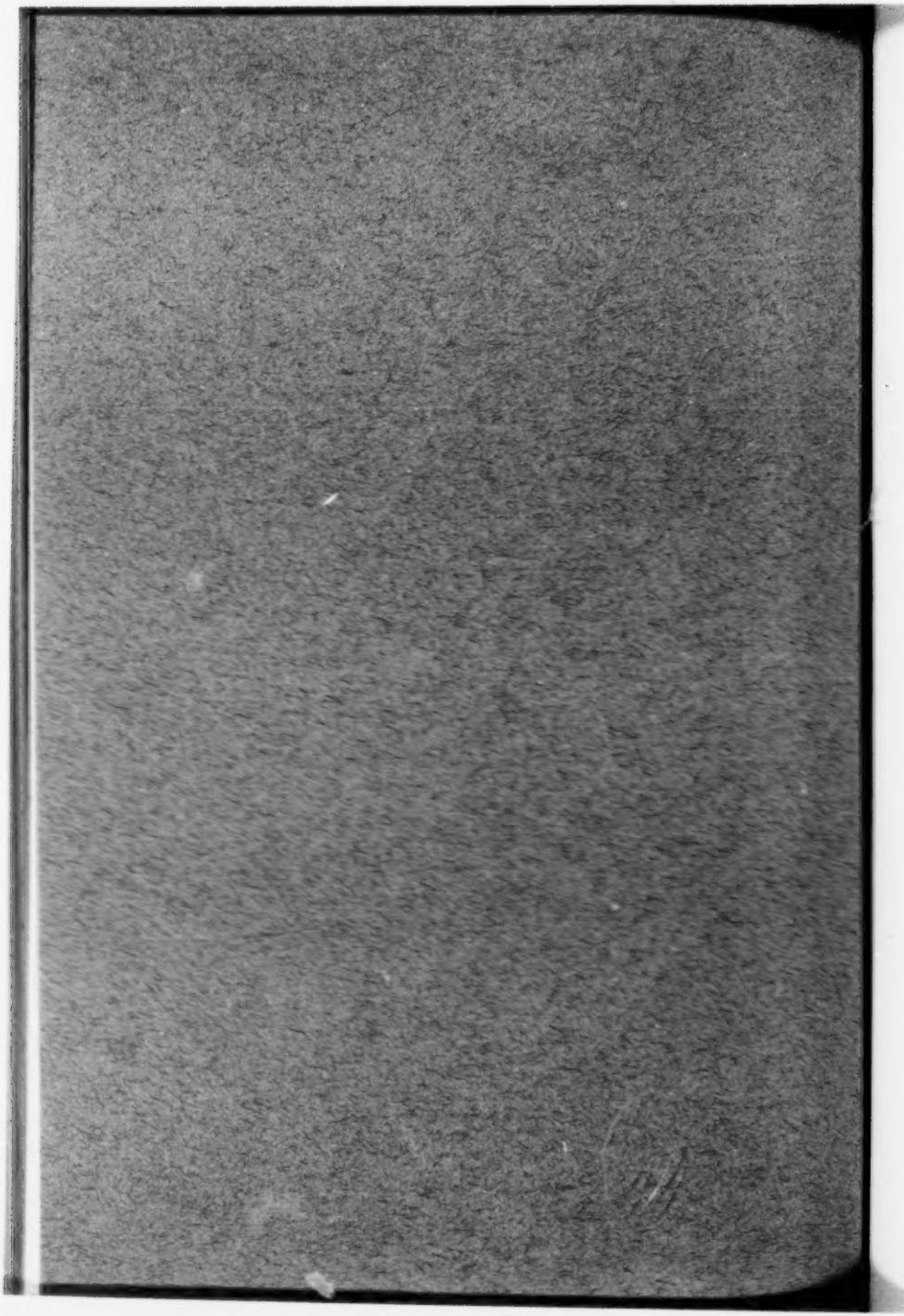

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568274—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 554

JULIUS ARONOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 189–191) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 17, 1943 (R. 192). The petition for a writ of certiorari was filed December 21, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crimi-

nal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence adduced at the trial on charges of transferring in anticipation of bankruptcy and concealing from the trustee in bankruptcy property belonging to the estate of the bankrupt, and of conspiring to do so, is sufficient to sustain the conviction of petitioner.

2. Whether in his instructions to the jury the trial judge erroneously failed to submit certain issues of fact for their determination.

STATUTES INVOLVED

Section 29 (b) of the Bankruptcy Act, as amended by the Act of June 22, 1938 (52 Stat. 855–856; 11 U. S. C. 52 (b)), provides in part:

> b. A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the * * * trustee * * * charged with control or custody of property * * * any property belonging to the estate of a bankrupt * * * or (6) while an agent or officer of any person or corporation, and in contemplation of a proceeding under this Act by or against such person or corporation, or with intent to defeat this Act, concealed

> or, with or without concealment, transferred any of the property of such person or corporation * * *

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner and Benjamin Goldberg, Harry Goldberg, and Meyer Greenberg were indicted in three counts in the United States District Court for the Eastern District of New York (R. 3–9). The first count charged that they unlawfully and knowingly conspired, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), to violate Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52 (b)) by transferring in anticipation of bankruptcy and concealing from the trustee in bankruptcy property in the amount of $36,000 which belonged to the estate of the Famous Furniture Co., Inc., the bankrupt. Six overt acts were alleged to have been committed in pursuance of the conspiracy. (R. 3–6.) Count 2 charged concealment of assets belonging to the estate of the bankrupt in

violation of Section 29 (b) (1) of the Bankruptcy Act (R. 6–8), and count 3 charged that while the two Goldbergs were officers of the bankrupt corporation, the defendants, in contemplation of a bankruptcy proceeding against the corporation and with intent to defeat the Bankruptcy Act, transferred corporate assets valued at $36,000 to petitioner and Greenberg, in violation of Section 29 (b) (6) (R. 8–9).

After a jury trial, petitioner was found guilty on all three counts (R. 165) and was sentenced to imprisonment for two years on each, the sentences to run concurrently (R. 12).[1] On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment in a *per curiam* opinion (R. 189–191).

The evidence adduced at the trial in support of the indictment may be summarized as follows:

The bankrupt, Famous Furniture Co., Inc., hereinafter referred to as Famous, conducted a retail furniture business in Brooklyn, New York (R. 61, 91, 190). Defendant Benjamin Goldberg was its president and secretary (R. 78) and defendant Harry Goldberg was vice president (R. 59).

Some time prior to the events dating from December 17, 1940, upon which the indictment was based, defendant Benjamin Goldberg purchased

[1] The other defendants pleaded guilty to count 1 (R. 10) and the remaining counts were dismissed as to them (R. 12).

the B. Glass, Inc., furniture store at Suffern, New York, on behalf of Famous (R. 78). Through a series of sales culminating in an auction on December 17, 1940, all of the stock of furniture and the fixtures of the Suffern store were sold at a considerable financial loss (R. 19, 113). Immediately thereafter the Suffern store was completely restocked with furniture taken from Famous' stock, which, according to the Goldbergs, had a cost price value of $15,000 (R. 30, 31, 59, 80). Famous then borrowed $5,000 from Majestic Factors Corporation, secured by the stock of the Suffern store, which at the time of the loan was inventoried at $14,500 (R. 27–29).

Thereafter, Benjamin Goldberg unsuccessfully undertook to dispose of the Suffern store's stock to a prospective purchaser (R. 79). At this stage, petitioner approached Benjamin Goldberg at the Famous store and stated that he understood that Goldberg needed money and that Goldberg had some merchandise at Suffern which he wanted to sell; petitioner offered to bring Goldberg into contact with a "wealthy associate" of his (R. 79). A meeting was immediately arranged, and petitioner introduced Goldberg to defendant Greenberg, who used the alias of Jack Sobel (R. 79–80). Petitioner, Greenberg, and Goldberg proceeded to the Suffern store where, after petitioner and Goldberg had checked the inventory (R. 80), the three "got into a huddle" and Goldberg was offered

$2,500 in cash, apparently as an inducement to "leave them the place, stock, lock and barrel"; it was further planned, according to Goldberg's testimony, that he "would get dollar for dollar for what was in there and that they were going to pull a fancy bust [2] and I [Goldberg] would still get out $30,000 and have my third interest" (R. 80).

The following day in New York, petitioner and Greenberg "worked out a deal" with Benjamin Goldberg whereby he was to receive "ninety cents on the dollar for all the" furniture in the Suffern store and they were to send trucks to transfer the furniture to an out-of-state buyer. Goldberg reserved from the deal the merchandise located on the ground floor of the store to cover the loan from Majestic Factors Corporation. Petitioner and Greenberg were to pay Goldberg for the stock when it was removed, and Goldberg was then to pay off the Majestic loan and permit them to remove the stock on the first floor. (R. 81.) Some time later, petitioner called on Goldberg at the Famous store and presented Goldberg with a bill of sale for the Suffern furniture, addressed "to whom it may concern," which he told Goldberg to sign, using a fictitious name. Goldberg did so. (R. 83.) With Goldberg's acquiescence (R. 37, 38, 81), furniture valued at $8,500 or $9,000 (R.

[2] At a later meeting among the three, petitioner and Greenberg boasted, "to hell with the creditors," we "have busted creditors for twenty-five years and know how to continue" (R. 97).

83) was removed from the upper floor and balcony of the Suffern store and taken to the Bergen Furniture Factory (hereafter called Bergen) in Brooklyn and to an unidentified warehouse in Brooklyn (R. 40, 41, 115, 116).[3]

During the course of these transactions and both before and after the removal of the furniture to Bergen's premises, petitioner made unsuccessful efforts to dispose of portions of it, and, at least on two occasions, doubt as to petitioner's ownership frustrated possible sales (R. 20–22, 47–49, 50).

During this period, petitioner, Benjamin Goldberg, and Greenberg had several meetings in a Brooklyn cafeteria with a view to arranging for the removal of furniture from the Famous store in Brooklyn (R. 84). Thereafter, in accordance with arrangements made at those meetings, the defendant Harry Goldberg removed the Famous store's label from a quantity of the store's stock of furniture and permitted a truck driver who identified himself with a previously arranged password to remove the furniture to the Bergen premises (R. 41, 60, 61, 115, 116). The furniture so removed had a cost price value of $20,000 (R. 61). Greenberg supervised the unloading of the furniture at the Bergen premises (R. 42).

[3] With the exception of $25 in retail sales (R. 34), there is no indication of the disposition made of the remaining furniture in the Suffern store. However, by the end of February 1941, the entire furniture stock at the store was gone (R. 29).

Petitioner testified on cross-examination that from January 1941 through March 31, 1941, Bergen sent furniture to one Pollock, a furniture auctioneer, and that Pollock paid for the furniture by checks made out to "A. Aronoff"[4] (R. (135–138).

Although petitioner testified that he was merely an employee of the Bergen Furniture Factory (R. 122), Benjamin Goldberg testified that petitioner had told him that he had $2,500 invested in Bergen and that Greenberg had $5,000 invested (R. 84, 87). Other evidence showed that petitioner originally leased the premises for the Bergen store (R. 134), that he and Greenberg offered to give Bergen to Benjamin Goldberg "as a substitute" for Famous (R. 87), and that petitioner was intimately connected with Bergen's finances (R. 134–142) until Bergen "failed" (R. 87).

On March 7, 1941, an involuntary petition in bankruptcy was filed against Famous in the United States District Court for the Eastern District of New York; it was adjudicated a bankrupt on March 29, 1941, and a trustee was appointed on August 21, 1941 (R. 17–18).

After the filing of the bankruptcy petition, petitioner, Greenberg, and Benjamin Goldberg met to discuss the bankruptcy hearings, and both petitioner and Greenberg "cautioned" and "warned"

[4] "A" is petitioner's wife's initial (R. 135).

Goldberg "not to mention anything about the transaction with them, that they had power in the furniture industry and controlled the situation" (R. 86). Thereafter, pursuant to prior commitments to the Goldbergs, petitioner and Greenberg organized and financed the Melvin Furniture Co., and the Goldbergs were placed in control of the operation of the store (R. 61, 62, 63, 72). Petitioner advised Harry Goldberg to "stop worrying about the Famous affairs; it would be straightened out; nothing to worry about" (R. 65).

An F. B. I. accountant who audited Famous' books testified that on January 1, 1941, Famous had a deficit of $64,837.86 and was insolvent in the amount of $19,837.86 (R. 109). The books reflected a merchandise shortage of $36,010.30 (R. 109) and showed that merchandise valued at $4,514.30 was shipped from Famous to the Suffern store, but the accountant's audit revealed that more loads of furniture were shipped than were accounted for in the books (R. 110). The books did not reflect any sales to petitioner, the receipt of any payment from petitioner or Greenberg (R. 114), or the transfer of any furniture to Bergen (R. 112). It was stipulated that the trustee in bankruptcy received no furniture or payment of any kind from petitioner or Greenberg (R. 18).

ARGUMENT

I

Petitioner asserts (Pet. 7–11, 16–22) that there was no proof (a) that Famous, the bankrupt, had any legal or equitable interest in the furniture removed from the Suffern store, or (b) that petitioner had knowledge of Famous' financial condition or of its interest in that furniture, and that for these reasons the evidence is insufficient to support the verdict. There is no merit in these contentions.

(a) Irrespective of the proof concerning Famous' interest in the Suffern furniture, it is not disputed that Famous owned the furniture which was removed directly from its store to the Bergen premises. Contrary to petitioner's contention (Pet. 11, 19), there was ample evidence that he was implicated in this transfer, and, moreover, that it represented but one phase of the scheme to transfer and conceal assets of Famous. As shown in the Statement, *supra*, p. 7, following the meeting at the Suffern store, at which plans were developed for the removal of the furniture stocked there, petitioner and Greenberg held further meetings with Benjamin Goldberg to arrange for the transfer of furniture from Famous' store in Brooklyn to Bergen's premises. A quantity of furniture from which Famous' labels had been removed was thereafter taken

from its store to Bergen's by a truck driver who identified himself with a previously arranged password. The evidence pertaining to this transaction, together with the other proof concerning the fraudulent nature of the entire deal, is, as the court below said (R. 190–191), alone sufficient to sustain the conviction.

As to the furniture removed from the Suffern store, the evidence plainly showed that Famous had a legal or equitable interest therein, either of which is sufficient to support the charges of the indictment. *United States* v. *Schireson,* 116 F. (2d) 881 (C. C. A. 3); *Goetz* v. *United States,* 59 F. (2d) 511 (C. C. A. 7), certiorari denied, 287 U. S. 649. Although the Suffern store was operated under its former name of B. Glass, Inc., after its purchase by Benjamin Goldberg on behalf of Famous, it is apparent that the store was in fact but a branch of Famous and it was so treated by the latter's officers (see, *e. g.,* R. 78). Thus, receipts from the Suffern close-out sale and auction in December 1949 were turned over to Famous and recorded in its books (R. 78). Thereafter, when it was decided to restock the Suffern store, Goldberg moved a portion of Famous' stock of furniture to Suffern (R. 80). Petitioner does not contend that Famous did not originally own this furniture, but he seeks to infer a transfer of title to B. Glass, Inc., from the mere transfer of furniture to the Suffern store (Pet. 7–8).

However, in view of the Goldberg brothers' testimony concerning the manipulations of the merchandise in the Famous and Suffern stores (R. 59, 79–83; see p. 5, *supra*) and the absence of any proof tending to show a transfer of title, the jury was warranted in concluding that the stock of furniture in the Suffern store was actually Famous' property. Cf. *United States* v. *Shapiro*, 101 F. (2d) 375 (C. C. A. 7), certiorari denied, 306 U. S. 657.

The subsequent financing transaction whereby Famous borrowed $5,000 from Majestic Factors Corporation, using the furniture in the Suffern store as collateral, plainly did not divest Famous of its property interest in the furniture. While it is not clear from the evidence whether legal title was transferred to the lender (R. 27–28), or the lender was merely given a security lien (R. 81), Famous retained at least a substantial equity in the furniture, for, although it was inventoried at $14,500 (R. 29), the loan was for only approximately one-third of that amount. Petitioner assails (Pet. 10–11, 19–20) this conclusion, which the court below also reached (R. 290), on the ground that Famous' books showed that furniture valued at only $4,514.30 was shipped to the Suffern store. But the audit of Famous' books by William Crawford, the F. B. I. accountant, revealed that more loads of furniture were shipped to Suffern than were accounted for in the books

(R. 110). And Crawford's conclusion in this regard is corroborated by the testimony of the Goldbergs that the furniture in the Suffern store was inventoried at about $15,000 (R. 59, 80) and the further testimony of the credit manager of Majestic Factors Corporation, the lender, that it had a value of $14,500 (R. 29).

(b) Regardless of petitioner's contention that there was no evidence that he knew of Famous' interest in the furniture in the Suffern store and of Famous' financial difficulties, there was, as we have already shown (*supra*, pp. 10–11), ample proof that he was implicated in the transfer of a quantity of furniture directly from Famous' store to Bergen's premises. After the filing of the bankruptcy petition, petitioner and Greenberg discussed the prospective bankruptcy hearings with Benjamin Goldberg and warned him not to mention his transactions with them (R. 86).[5] It is thus clear that petitioner knew of the bankruptcy

[5] Benjamin Goldberg also testified that following his arrest he met with petitioner and Greenberg and that petitioner told Greenberg that Greenberg was "just as guilty as anybody and that he must chip in $500 so Ben [Goldberg] could get his composition" with his creditors (R. 89–90). Harry Goldberg testified that in January 1947, after he had pleaded guilty and petitioner was awaiting trial (see R. 10–11), petitioner told him "that I [Goldberg] had no right to go to the FBI. That if I had come to him, he would have contacted Meyer Greenberg and would have seen to it that my family would get fifty dollars a week and if necessary I would take the blame for something I had never done," meaning "the Famous Furniture bankruptcy" (R. 66).

proceeding and that he was a party to the concealment of this lot of furniture from the trustee.[6]

Apart from this aspect of the case, however, the evidence is clear that petitioner knew of Famous' financial difficulties, which culminated in the bankruptcy, and that Famous owned the furniture in the Suffern store. When petitioner first approached Benjamin Goldberg at the Famous store in Brooklyn, he knew that Goldberg "need[ed] money" and that Goldberg had "some merchandise at Suffern" which he wanted to sell (R. 79). Petitioner had had prior business dealings with Famous (R. 122), and, according to Goldberg's testimony, "everything that Ben Goldberg did was on behalf of the Famous Furniture Company" (R. 78). At the subsequent meeting in the Suffern store, petitioner, Goldberg, and Greenberg planned "to pull a fancy bust" (R. 80) and later petitioner and Greenberg boasted that they had been "busting" creditors over a long period of time (R. 97). Some time later, Greenberg and petitioner loaned Goldberg $2,500, and petitioner deposited his share of the loan in Famous' bank account, returning the bank book

[6] The proof in this regard is sufficient to sustain the conviction under the second count of the indictment charging concealment of assets from the trustee. In respect of this count, it is immaterial whether petitioner knew of Famous' financial difficulties prior to the bankruptcy. Since the sentences on the three counts were ordered to run concurrently (R. 12), the conviction on the second count is sufficient to sustain the judgment. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.

to Famous by mail (R. 81–82). Following the consummation of the deal, and as part of it, petitioner and Greenberg set up a new furniture business under the Goldbergs' management (R. 61, 62, 63, 72).

This evidence, viewed in the light of the other evidence summarized in the Statement, *supra*, pp. 5–9, clearly shows that petitioner had intimate knowledge of Famous' financial affairs and its interest in the Suffern store and that he had an active part in the execution of the fraudulent scheme upon which the charges of the indictment were founded.[7]

II

Relying solely upon an excerpt from the trial judge's instructions to the jury, petitioner contends (Pet. 12–13, 21–22) that the judge erroneously limited the jury's consideration to the question whether petitioner participated in the transactions described in the testimony and failed to submit to the jury the questions whether the bankrupt had any property interest in the Suf-

[7] Petitioner's further contentions (Pet. 10, 20) that the evidence shows merely that he was a "contact" man for Greenberg and that there was a legitimate sale of the Suffern furniture are specious. The proof is clear that they and Benjamin Goldberg planned a "bust" of Famous' creditors and that the purported sale was merely a device to enable petitioner to dispose of the furniture (*supra*, pp. 6–7). Famous' books showed no sale to petitioner, Greenberg, or Bergen (R. 112, 114), and Famous never received any payment for the furniture (R. 85, 114).

fern furniture and whether the transaction in respect of that furniture was a sale. A reading of the charge as a whole, however, negates petitioner's contention.

The judge read to the jury the statutory language upon which the indictment was founded and then paraphrased it by emphasizing "that it is unlawful to conceal from the Trustee property that belongs to the estate of the bankrupt" or to conceal "any property of the corporation by transferring it prior to bankruptcy" (R. 156–157). He then summarized the indictment (R. 157–160), advising the jury that it charged, *inter alia*, that the defendants transferred and concealed property which it was alleged "belonged to the Famous Furniture Company, Inc.," and which after March 7, 1941, "belonged to the estate of the bankrupt" (R. 158, 159–160). After instructing the jury concerning the presumption of innocence and the burden of proof (R. 160), the judge fairly reviewed the evidence on both sides (R. 160–163). Before permitting the jury to retire, he offered counsel an opportunity to request additional instructions (R. 164). Although there was one exception to the charge as given and further exceptions to the judge's denial of requested additional instructions, petitioner's trial counsel did not, as petitioner concedes (Pet. 22), request instructions on the questions which he now contends should have been specifically called to the jury's attention, nor did he except to the charge in that regard (see R. 164–165).

Moreover, the Suffern furniture, in respect of which petitioner contends the instructions were deficient, was, as we have shown (*supra*, pp. 10–11, 13–14), only a part of Famous' furniture involved in the scheme; Famous' title to the other furniture involved is not disputed. Since the evidence is amply sufficient to support the verdict, and since petitioner did not except to the instructions in the particulars of which he now complains, no ground for reversal is established. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239; *Holmgren* v. *United States*, 217 U. S. 509, 523, 524; *Allis* v. *United States*, 155 U. S. 117, 122.

CONCLUSION

Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants review on certiorari, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

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